

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JAN 19 2006

at 9 o'clock and 30 min. AM
SUE BEITIA, CLERK

ARLEEN D. JOUXSON 7223-0
RAFAEL G. DEL CASTILLO 6909-0
Jouxson-Meyers & del Castillo
A Limited Liability Law Company
302 California Ave., Suite 209
Wahiawa, Hawai'i 96786
Telephone: (808)621-8806; Fax: (808)422-8772
E-Mail Address: rdelcastillo@physicianslawfirm.com

Attorneys for Plaintiff
Hawaii Children's Blood And Cancer Group

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Hawaii Children's Blood and
Cancer Group,

Plaintiff,

vs.

Hawai'i Pacific Health; Kapi'olani
Medical Specialists; Kapi'olani
Medical Center for Women and
Children,

Defendants.

) Civil No. CV 03-00708 SOM/LEK
)
)
) PLAINTIFF'S REPLY TO
) DEFENDANTS' OPPOSITION TO
) PLAINTIFF'S MOTION TO STRIKE
) OR DISMISS DEFENDANTS'
) RENEWED MOTION TO DISMISS, OR
) IN THE ALTERNATIVE, TO STAY
) PROCEEDINGS PENDING
) RESOLUTION OF THE
) CONCURRENT STATE OF HAWAII
) CIRCUIT COURT CASE, OR TO
) CONTINUE TRIAL, FILED JANUARY
) 11, 2006 WITHOUT LEAVE TO FILE
) AFTER THE DECEMBER 21, 2005
) DISPOSITIVE MOTIONS DEADLINE;
) CERTIFICATE OF SERVICE
)
)
)

) HEARING:

) Date: JANUARY 19, 2006

) Time: 2:15 P.M.
)

) Judge: Hon. Susan Oki Mollway

) JUDGE: Hon. Susan Oki Mollway,
) U.S. District Judge
) Hon. Leslie E. Kobayashi,
) U.S. Magistrate Judge
)
) TRIAL: MAY 23, 2006
) 9:00 a.m.

**PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION TO STRIKE OR DISMISS DEFENDANTS' RENEWED
MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY
PROCEEDINGS PENDING RESOLUTION OF THE CONCURRENT
STATE OF HAWAII CIRCUIT COURT CASE, OR TO CONTINUE
TRIAL, FILED JANUARY 11, 2006 WITHOUT LEAVE TO FILE
AFTER THE DECEMBER 21, 2005 DISPOSITIVE MOTIONS DEADLINE**

Plaintiff Hawaii Children's Blood and Cancer Group, by and through its undersigned counsel, hereby submits its Reply to Defendants' Opposition to Plaintiffs' Motion to Strike or Dismiss Defendants Hawai'i Pacific Health, Kapi'olani Medical Specialists, and Kapi'olani Medical Center for Women and Children's Renewed Motion To Dismiss, Or In The Alternative, To Stay Proceedings Pending Resolution Of The Concurrent State Of Hawaii Circuit Court Case, Or To Continue Trial, filed January 11, 2006 Without Leave to File After the December 21, 2005 Dispositive Motions Deadline.

Defendants' reference to the extension of the due dates for the expert reports is a red herring. It is not true that "the parties would be precluded from filing any dispositive motions in connection with the opinions the experts provide. . . ." nor is it true that "the court would be precluded from making any dispositive

rulings in this action and cannot summarily adjudicate in whole or in part either parties' claims or defenses." *See* Opposition at 4. Pursuant to Rule 16(b), either party may seek an amendment to the Scheduling Order to permit the filing of a dispositive motion based on the experts' opinions, but that motion is for some future day when the experts have given their reports and been deposed.

Defendants cannot at this time meet the requirements of Rule 16(b) for such a motion.

Secondly, it is not true that Plaintiff overlooked the dispositive motions deadline. At the time of the stipulation, there was insufficient information and evidence to meet the requirements for extending the dispositive motions deadline.

Thirdly, Defendants have omitted material facts from their representations regarding the extension of the due date for the expert reports. Defendants were faced with the prospect of a motion by Plaintiff to compel their witnesses to appear for their depositions in November 2005, which would have interfered with Mr. Robbins' plan to be on the mainland during November for business and pleasure. Defendants had agreed—and the State Discovery Master had ordered—that their witnesses would be produced for their depositions in October 2005 and they had failed to do so. Defendants thus had to choose between facing Plaintiff's motion to compel and stipulating to an extension of the due date

for its experts' reports until a reasonable time after the transcripts of those depositions were completed. They chose the latter. Far from being "accommodated," Plaintiff has been materially inconvenienced and prejudiced in its preparation for trial by Defendants' delays in producing witnesses for their depositions and in responding to discovery requests. In fact, Defendants' recalcitrance has been and still is the only reason the parties have sought extensions of the deadlines in the Scheduling Order, and thus Defendants are due no "quid pro quo" or consideration of any kind.

Fourthly, Defendants failed to show that their failure to comply with the Scheduling Order may be excused. The circumstances are governed by the interpretations of Rule 16(b) which require a finding of diligence: "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992), followed by *Doe v Haw. Dep't of Educ.*, 351 F. Supp 2d 998, 1006-07 (D. Haw. 2004). Defendants' "excusable neglect" argument admits carelessness, which the court in *Johnson* held "is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609. Moreover, the court in *Johnson* held that the consideration does not rest on the absence of prejudice to the non-moving party: "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a

motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. . . . If that party was not diligent, the inquiry should end.” *Id.* Defendants have failed to show that the inquiry should go any further in this case, and Plaintiff’s Motion to Strike or Dismiss their Renewed Motion to Dismiss should be granted.

CONCLUSION

For all of the foregoing reasons, Plaintiff requests an order striking or dismissing Defendants Hawai`i Pacific Health, Kapi`olani Medical Specialists, and Kapi`olani Medical Center for Women and Children’s Renewed Motion To Dismiss, Or In The Alternative, To Stay Proceedings Pending Resolution Of The Concurrent State Of Hawaii Circuit Court Case, Or To Continue Trial, filed January 11, 2006 (hereinafter, the “Renewed Motion”), as untimely filed pursuant to the Amended Rule 16 Scheduling Order establishing December 21, 2005 dispositive motions deadline.

Dated: Honolulu, Hawai`i, January 19, 2006



ARLEEN D. JOUXSON
RAFAEL G. DEL CASTILLO

Attorneys for Plaintiff
Hawaii Children’s Blood and Cancer Group

ARLEEN D. JOUXSON 7223-0
RAFAEL G. DEL CASTILLO 6909-0
Jouxson-Meyers & del Castillo
A Limited Liability Law Company
302 California Ave., Suite 209
Wahiawa, Hawai'i 96786
Telephone: (808)621-8806; Fax: (808)422-8772
E-Mail Address: rdelcastillo@physicianslawfirm.com
Attorneys for Plaintiff
Hawaii Children's Blood And Cancer Group

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Hawaii Children's Blood and Cancer Group,) Civil No. CV 03-00708 SOM/LEK
)
Plaintiff,) CERTIFICATE OF SERVICE
) [Reply on Motion to Strike or Dismiss]
)
vs.) HEARING:
) Date: January 19, 2006
Hawai'i Pacific Health; Kapi'olani) Time: 2:15 p.m.
Medical Specialists; Kapi'olani) Judge: Hon. Susan Oki Mollway
Medical Center for Women and)
Children,)
)
Defendants.) TRIAL: May 23, 2006
) 9:00 a.m.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the document referred to in the foregoing caption will be duly served upon counsel named below at their last known address, as follows:

TO:	KENNETH S. ROBBINS, ESQ.	<u>via facsimile</u>
	2200 Davies Pacific Center	<u>via hand delivery</u>

841 Bishop Street
Honolulu, Hawai'i 96813


DAVIS WRIGHT TREMAINE

DOUGLAS ROSS
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
Telephone: (206) 628-7754
Facsimile: (206) 628-7699
Email: douglasross@dwt.com

via facsimile
via 1st class mail

Attorneys for Defendants
Hawai'i Pacific Health, Kapi'olani Medical Specialists,
and Kapi'olani Medical Center for Women and Children

Dated: Honolulu, Hawai'i, January 19, 2006



ARLEEN D. JOUXSON
RAFAEL G. DEL CASTILLO

Attorneys for Plaintiff
Hawaii Children's Blood and Cancer Group